IN THE

Supreme Court of the United States

JAN 17 19[illegible]
MICHAEL RODAK, JR., [illegible]

October Term, 1974

No. 74-880

HENRIETTA PALOMARES,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondent,

BLACKMAN PLUMBING COMPANY, ED BLACKMAN, LESTER BLACKMAN, CONSOLIDATED AIR CONDITIONING COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Real Parties in Interest.

Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

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Real Parties in Interest.

Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

Henrietta Palomares, requests that a Writ of Certiorari issue to review a judgment of the California Court of Appeal, Second Appellate District, after denial for hearing thereon by the California Supreme Court dated November 8, 1974, for review of a decision of the Workmen's Compensation Appeals Board of the State of California.

I.

Opinion Below.

The Judgment and Opinion of the Workmen's Compensation Appeals Board, State of California, which dismissed Petitioner's complaint is printed in Appendix "A". Neither the California Supreme Court nor the California District Court of Appeal filed an opinion. Their "denials" for review are printed in Appendix "C".

II.

Jurisdiction.

This appeal is taken pursuant to 28 U.S.C.A. 1257 (2)(3) and is a request for certiorari to review the above State Court judgment wherein the validity of a State statute is drawn in question as repugnant to the United States Constitution, Amendment XIV, equal protection and deprivation of right for lack of due process, and Amendment V, due process clause.

III.

Questions Presented.

A. Federal Rights Cannot Be Confined Within State Bar Limitations.

1. Whether a fiction of "imputed knowledge" which disqualifies a widowed dependent from workmen's compensation award before her cause of action has accrued which results in the forfeiture of a state created right to death benefits constitutes a violation of the Fourteenth Amendment, equal protection and due process clause, and the due process clause of the Fifth Amendment, under the facts at bar.

2. Whether an "artificial date of injury" which justifies an extension and preservation of a right to an

award for workmen's compensation injury may also be used to bar and take away the right to an award for compensation injury as related to victim beneficiaries without intrinsic constitutional basis for separate classification, in violation of the Fourteenth Amendment, equal protection and due process clause, and the due process clause of the Fifth Amendment, under the facts at bar.

3. Whether California Labor Code Section 5406 is constitutionally invalid under the equal protection clause of the Fourteenth Amendment of the Federal Constitution because it sets up a rule which is discriminatory within the same subject matter *in pari materia* with California Labor Code Section 5412, which latter code section extends the time within which to protect an industrial occupational injury, whereas the former code section bars recovery without proper constitutional distinction or classification.

4. Whether California Labor Code Section 5406 is constitutionally invalid under the due process clause because it imputes "knowledge" of the causation of an unknown occupational disease, contrary to science, medicine, and natural law, in an arbitrary, discriminatory manner thereby depriving an aggrieved party of a right created by State statute.

IV.

Reasons for Granting Writ.

To prevent *under an unconstitutional guise* of statutory limitation, the taking away from a citizen of the legal effect of a state created right, vested in such citizen.

The right created by state law consisted of a cause of action which had "accrued" to recover death benefits

already provided for, arising out of a cumulative industrial occupational injury, pursuant to California Labor Code Sections 4701-4702.

The State test for "accrual" of the cause of action consisted of having "knowledge" *or the discovery* of industrial causation of an occupational disease based upon the available medical facts, which under the State law was by legislative definition determined to be *the Date of Injury*.

In the case at bar, the date of accrual or *date of injury* of industrial causation of an occupational disease *was imputed* to appellant widow of a deceased employee prior to the time that she had knowledge or upon available medical facts could have discovered the occupational industrial causation of decedent's death.

As a dependent entitled to death benefits and award, the State statute which had imputed knowledge and discovery resulted in an arbitrary denial of her cause of action in violation of the Fourteenth Amendment, equal protection and due process clauses, and Fifth Amendment, due process clause.

In the case of other victims of the same class, *i.e.*, those suffering prejudice from injuries received in cumulative industrial occupational accidents, "knowledge" or discovery of industrial causation prior to the existence of available medical facts, was not imputed, thus *preserving their cause of action*, instead of taking away the right by a limitation period in violation of the equal protection clause.

Since the appellant's vested right to recovery was taken away before it had "accrued", and before the "date of injury" as defined by State law, she was denied due process of law.

"Date of injury" cannot be defined two different ways by State law, one to preserve a right and another to destroy a right when such dual entitlement is discriminatory in effect.

A federal right cannot be confined within the bar terms of a State statute by causing forfeiture of a right intended to insulate appellant widow from poverty and financial insecurity.

Pursuant to the above, petitioner argued and made exceptions to the courts below that the legislative constitutional classification to deprive appellant of her right was not based upon a natural intrinsic and constitutional distinction. Appellant raised substantial questions of federal violation by alleging that Labor Code Section 5406, as applied in the case at bar, was "constitutionally impermissible", "contrary to law", "substantively and procedurally unconstitutional", and that a lack of finding that there was no knowledge of industrial causation available to appellant or to the medical profession invalidated the judgment.

V.

Statement of the Case.

Petitioner-appellant widow of a deceased employee who died suffering from an unknown occupational illness, instituted her action at bar to recover as an aggrieved injured person, *death benefits and award,* within thirty days after "knowledge" of the industrial causation of death by an occupational disease. At the time of her husband's death, it was not known that "mesotheleoma" was industrially caused, nor should it or could it have been known under the state of the medical art of diagnosis that the disease or ailment which resulted in death had been industrially caused.

The facts as pleaded by Appellant below before the Workmen's Compensation Appeals Board, State of California, appear in Appendix "D", entitled "Supplemental Application".

The California Courts rejected the claim of the dependent widow beneficiary of an industrially caused death by applying to her *the fiction of imputing "knowledge"* of its cause *when her husband died,* and that she was required to file an application therefor within one year but no later than 240 weeks after death, pursuant to the limitation sections set forth in Labor Code Section 5406.

The right created in favor of the dependent widow in the case at bar to insulate her from poverty and financial insecurity, was taken away from her before it accrued!

State statutes of limitation do not usually present a justiciable federal question. However, when a right is lost before it has accrued and recovery is arbitrarily and capriciously lost by a State classification of victims which are not treated alike and without natural intrinsic and constitutional distinction, the equal protection clause of the Fourteenth Amendment is violated.

VI.
Date of Injury Rule.

Section 3202 of the California Labor Code reads: "The provisions of Division 4 and Division 5 of this Code shall be liberally construed by the courts with the purpose of expending their benefits for the protection of *persons injured* in the course of their employment".

Within said provisions of Division 4, Article 4 of Chapter 2 of Part 2, death benefits accrued to certain

dependents of a deceased employee and specified decedent's widow.

Labor Code Section 5406 is the state law herein assigned as being violative of the constitution. It is set forth in a chapter which reads, "COMPENSATION PROCEEDINGS".

Said code section gives the right to *death benefits* when the *date of injury* accrues, *but no more than one year after the date of death.*

Labor Code Section 5412, reads:

> "DATE OF INJURY FOR OCCUPATIONAL DISEASE. The *date of injury* in cases of occupational disease is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment".

The sole purpose of the State law quoted above is to make benefits available to victims of an industrially related "cumulative" injury. State law has adopted the *rule* that the right of an award for cumulative injury *accrues* on the date of "discovery". That upon "discovery" a claim may be made, for it is then that the *injury accrues.*

Prior to said date of discovery no proceedings for a cumulative injury may be prosecuted by an aggrieved party, nor a cause of action stated, and any proceedings filed prematurely would be dismissed for failure to state a cause of action.

The State of California in enacting said legislation requiring "discovery" and "knowledge" of industrial causation of an occupational disease, did so, in keep-

ing with modern medical *diagnostic* practices and specifically provided an "artificial date of injury", to wit: the "date of discovery", to preserve the right of action in favor of the victims of such illness, *i.e.*, the employee or his dependents, because of the failure of medical science to anticipate and *know* the proximate causation of many modern industrial injuries which are coming to light for the first time.

VII.

The "Discovery Rule" at Bar Although Preserved in Favor of One Class of Victims Was Denied Petitioner Victim of the Same Class Without Natural Intrinsic Constitutional Basis.

All victims of industrial injuries are protected by the California Labor Code which is entitled, "COMPENSATION PROCEEDINGS". All actions for monetary benefits or awards are deemed to be compensation proceedings, whether benefits sought be medical, disability, permanent or death benefits.

To entitle an aggrieved victim to institute compensation proceedings for a cumulative industrial injury, "knowledge" of industrial causation was legislated under Labor Code Section 5412 as an affirmative requirement for a cause of action to accrue.

To recover in compensation proceedings, for disability or death benefits, it is required by State law in said Labor Code Section 5412, that the Date of Injury be set forth. The *discovery* of the industrial causation of a cumulative occupational disease is defined as the *date of injury*. It is an Artificial Date of Injury Created by State Law, which by its definition cannot be denied to victims of industrial injuries upon the grounds that they are dependents, *i.e.*, in the case at bar, *a*

widow. Labor Code Section 5406, unlike Labor Code Section 5412, *in pari materia* deprived petitioner widow of her right to discover a death award provided by State law, by disqualifying her from said benefits and causing the same to be forfeited prior to the date that her cause of action "accrued", to wit: before she was able to "discover" or have "knowledge" of any facts, and before facts were available to produce before the Board to substantiate a claim.

ALTHOUGH LABOR CODE SECTION 5406, WHICH IS THE CODE SECTION HEREIN ATTACKED FOR UNCONSTITUTIONAL INVALIDITY, ALSO HAS A "DISCOVERY" OR "KNOWLEDGE" RULE WHICH IS DEFINED AS THE *DATE OF INJURY*, IT IS MEANINGLESS AND IS NOT APPLIED EQUALLY, AS THE ACTION FOR DEATH BENEFTS IS BARRED TO A DEPENDENT WIDOW WITHIN ONE YEAR AFTER HER SPOUSE'S DEATH, AND SHOULD SHE "DISCOVER" OR WITH DILIGENCE GAIN "KNOWLEDGE" OF ITS INDUSTRIAL CAUSATION ONE YEAR AND ONE DAY AFTER DEATH, WHICH IS THE *DATE OF INJURY* AS DEFINED BY LAW, SHE IS DEPRIVED OF HER PROPERTY RIGHT.

VIII.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MANUEL RUIZ, JR.,
Attorney for Petitioner
Henrietta Palomares.

APPENDIX A.

Findings and Order.

Workmen's Compensation Appeals Board, State of California.

Henrietta Palomares, (Widow) Alfred E. Palomares, (Deceased), Applicant, vs. Blackman Plumbing Company; Hartford Accident & Indemnity Co.; Consolidated Air Conditioning; Pacific Employers Mutual Liability Insurance Company of Wisconsin, Defendants. Case No. 72 LA 376-393.

Application having been filed herein; all parties having appeared, and the matter having been regularly submitted, the Honorable MARVIN M. SCHALIT, Referee finds and orders as follows:

FINDING OF FACT

1. This cause of action is barred by Labor Code Section 5406.

ORDER

IT IS ORDERED that applicant take nothing.

/s/ Marvin M. Schalit,
Marvin M. Schalit, Referee
Workmen's Compensation Appeals Board

Executed on June 21, 1974.

Served on said date by mail on persons shown on the official address record.

By: /s/ Glen Cleddy

MMS:Le
[Seal]

APPENDIX B.

Order Denying Reconsideration.

Workmen's Compensation Appeals Board, State of California.

Henrietta Palomares, (Widow) Alfred E. Palomares, (Deceased) Applicant, vs. Blackman Plumbing Company, Inc.; Consolidated Air Conditioning; Pacific Employers Insurance Company; et al, Hartford Accident & Indemnity Company, Defendants. Case No. 72 LA 376-393.

We have considered the allegations of the Petition for Reconsideration on file herein and the contents of the Referee's Report with respect thereto. Based on our review of the record, and for the reasons stated by the Referee, whose report we herewith adopt and incorporate,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, DENIED.

WORKMEN'S COMPENSATION
APPEALS BOARD
/s/ Arthur J. Costamagna

I concur. /s/ A. G. Boardman; /s/ C. L. Swezey, Deputy.

Dated and filed in San Francisco, California. July 31, 1974.

Service by mail on said date to all parties listed on the official address record.

/s/ Martha J. Cowger

[Seal]

APPENDIX C.

Los Angeles, Cal. Oct. 10, 1974

TITLE:

Palomares vs. W.C.A.B. No. 44825.

The Court: Petition for Writ of Review Is Denied.

Clerk's Office, Court of Appeal, Second District, California. State Building, Room 1201, Civic Center, Los Angeles, Calif. 90012.

San Francisco, California 94102
Nov. 8, 1974

TITLE:

Palomares v. W.C.A.B. No. 44825.

Clerk's Office, Supreme Court, 4250 State Building.

I have this day filed Order. . . . HEARING DENIED.

In re: 2 Civ. No. 44825.

Respectfully,
G. E. Bishel, Clerk

APPENDIX D.

Supplemental Application (Death) Authorities in Support.

Workmen's Compensation Appeals Board, State of California.

Application for Adjudication of Death Claim.

Re: Alfred E. Palomares, deceased. Social Security No. 552-10-0571-D.

By: Henrietta Palomares, widow of said Decedent.

Attention: Hon. Marvin M. Schalit, Referee. No. 79 LA 376393.

This petition is filed in conformity with the order of the Honorable Marvin M. Schalit, Referee, dated January 24, 1974, that applicant file a supplemental application on death benefits.

IT IS CLAIMED BY WAY OF SUPPLEMENTAL APPLICATION AS FOLLOWS:

1. a. Deceased employee was born March 2, 1906, in the County of Los Angeles, California.
   b. At the time of decedent's death he had been employed by defendants Blackman Plumbing Co., Inc., aka Ed Blackman dba Ed Blackman and Son, and Lester Blackman, John Doe dba as Blackman Plumbing and Consolidated Air Conditioning Co., as a plumbing foreman and plumber.
   c. Decedent died on September 5, 1964, from an occupational related desease, to-wit: Mesothelioma.

d. Applicant alleges that said mesothelioma was malignant, and that it was contracted and acquired pursuant to and in the course of decedent's employment.

e. Copies of the diagnosis, autopsy, and hospital records have heretofore been filed in the above action, and served upon all defendants and their insurance carriers, and the same are made a part of these pleadings by reference.

f. It is alleged that the medical records above referred to, show that there was no suspicion by the professional doctors and medical staff, that the cause of decedent's condition was industrially related or caused.

2. a. During decedent's employment he suffered no specific injury. Neither decedent nor applicant, his widow, knew, during decedent's lifetime, nor after decedent's death, except as hereinabove set forth, that decedent's physical condition had been industrially related, i.e. respiratory contact with fibers in the air from asbestos and its by-products, in the course of his employment.

b. Neither decedent nor applicant knew, nor in the exercise of reasonable diligence should have known, that decedent's cumulative mesothelioma was caused by decedent's employment. The cause of death was discovered by applicant two weeks before she filed her application.

3. a. The actual earnings of decedent at the time of his death were three hundred ten dollars ($310.00) per week.

4. There was no prior disability.

5. There was no claim for compensation, nor compensation paid.

6. No medical treatment was provided or paid by the employers or their insurance carriers. There was self procured medical treatment in the sum of $5844.65, plus Doctors' in the sum of $1485.90. The doctors who treated decedent were: R. Merl Ledford, M.D.; Harvey A. Humphrey, M.D.; N. Cobb, M.D.; G. Gibbons, M.D.; J. Chambers, M.D.; Harry E. Mass, M.D., pathologist. Donald N. Shart Memorial Hospital, San Diego, California.

7. Defendants have not paid burial expenses. Burial expenses were self-procured and paid in the sum of $549.00.

8. The decedent employee left surviving him as his sole dependent, applicant widow, Henrietta Palomares.

9. It was stipulated by the parties on October 26, 1973, that defendant Pacific Employers Insurance Company, for and on behalf of defendant Consolidated Air Conditioning Company and all defendants and their insurance carriers, with their consent and authorization, would file a motion for the dismissal of the application on the ground that the cause of action was barred by the statute of limitations.

10. After considering the motion for dismissal of the application on file and points and authorities in support thereof, on November 26, 1973, the Honorable Marvin M. Schalit, Referee, denied the defendants motion for dismissal.

The request for dismissal, and applicant's response thereto, and request for hearing and denial of request for dismissal, is on file, and is made a part of these pleadings, by reference, as though set forth in full.

WHEREFORE, applicant requests a hearing and an award of: Death benefits, burial expenses, medical bills, medical legal expenses, legal fees and all other appropriate benefits provided by law.

Dated at Los Angeles, California, February 8th, 1974.

/s/ Henrietta Palomares
Applicant

/s/ Manuel Ruiz, Jr.,
Manuel Ruiz, Jr.
Attorney for Applicant

State Statutes—California Labor Code.

Workmen's Compensation
Div. 4, Pt. 4, Chap. 2

§ 5406. *Death benefits*

The period within which may be commenced proceedings for the collection of the benefits provided by Article 4 of Chapter 2 of Part 2 of this division is one year from:

(a) The date of death where death occurs within one year from date of injury; or

(b) The date of last furnishing of any benefits under Chapter 2 of Part 2 of this division, where death occurs more than one year from the date of injury; or

(c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury.

§ 5411. *Date of injury*

The date of injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed.

§ 5412. *Date of injury for occupational disease*

The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise

of reasonable diligence should have known, that said disability was caused by his present or prior employment.

§ 3202. CONSTRUCTION. The provisions of Division IV and Division V of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

§ 4701. *Liability for burial expenses and death benefit.* Where an injury causes death, either with or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for:

(a) Reasonable expenses of the employee's burial not exceeding six hundred dollars ($600).

(b) A death benefit, to be allowed to the dependents when the employee leaves any person dependent upon him for support.

Workmen's Compensation
Div. 4, Pt. 2, Chap. 2, Art. 4

§ 4702. *Amount: Payment: Deduction of disability indemnity from death benefit: Death to which applicable.* Except as provided in the next paragraph, the death benefit in cases of total dependency, when added to all accrued disability indemnity, shall be the sum of seventeen thousand five hundred dollars ($17,500) except in the case of a surviving widow and one or more dependent minor children, in which case the death benefit shall be twenty thousand five hundred dollars ($20,500) and except as otherwise provided

in Sections 4553 and 4554. In cases of partial dependency the death benefit shall be a sum equal to four times the amount annually devoted to the support of the dependents by the employee, not to exceed the sum of fifteen thousand dollars ($15,000). The death benefit in all cases shall be paid in installments in the same manner and amounts as temporary disability indemnity, payments to be made at least twice each calendar month, unless the commission otherwise orders.

Disability indemnity shall not be deducted from the death benefit and shall be paid in addition to the death benefit when the original injury resulting in death occurs after the effective date of the amendment to this section adopted at the 1949 Regular Session of the Legislature.

Every computation made pursuant to this section shall be made only with reference to death resulting from an original injury sustained after this section as amended during the 1959 Regular Session of the Legislature becomes effective; provided however, that all rights presently existing under this section shall be continued in force.

Federal Constitutional Provisions.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Apportionment of Representatives

AMENDMENT V

Criminal Proceedings and Condemnation of Property

[*Section 1.*] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SUPREME COURT, U. S.

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Real Parties in Interest.

Answer to Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

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Real Parties in Interest.

Answer to Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Henrietta Palomares, seeks a Writ of Certiorari to review the constitutionality of the California Labor Code Section 5406. Respondents, Hartford Accident and Indemnity Company and Employers Mutual Liability Insurance Company of Wisconsin aver:

I

PETITIONER'S FAILURE TO QUESTION THE CONSTITUTIONALITY OF LABOR CODE SECTION 5406 AT EITHER THE TRIAL LEVEL OR IN HER PETITIONS FOR REVIEW TO THE COURTS OF CALIFORNIA MAKE SUCH A CLAIM UNAVAILABLE TO HER ON PETITION FOR CERTIORARI.

II

AS THERE IS GOOD REASON TO LIMIT THE TIME WITHIN WHICH WIDOWS OF DECEASED EMPLOYEES MAY FILE CLAIMS FOR WORKMEN'S COMPENSATION DEATH BENEFITS AND AS ALL WIDOWS FILING SUCH CLAIMS ARE TREATED EQUALLY, LABOR CODE SECTION 5406 IS NOT UNCONSTITUTIONAL.

Statement of Facts.

On or about June 30, 1972, Petitioner filed an application for adjudication of claim with the Workmen's Compensation Appeals Board of the State of California claiming benefits as the dependent-widow of Alfred E. Palomares, deceased. The application showed on its face that said decedent had died on September 5, 1964—over seven years prior to the date of filing.

Thereafter, the application was amended on several occasions. However, Petitioner's theory remained the same, to wit, that decedent was, over a 19-year period of employment, exposed to asbestos by-products causing a malignant tumor of the lungs as a result of which he died on September 5, 1964.

In answering Petitioner's claim, all defendants raised the defense of the Statute of Limitations—specifically

the limitation found in California Labor Code Section 5406.

In response to a Petition for Dismissal based on the Statute of Limitations filed by one of the defendants, Petitioner herein filed a written argument, attached hereto and marked as Exhibit A. In her argument, Petitioner did not question the constitutionality of Labor Code Section 5406. Instead, Petitioner argued that Labor Code Section 5406 was not applicable to the facts alleged in her claim.

The Petition for Dismissal having been rejected, on May 29, 1974 all parties appeared before a referee of the Workmen's Compensation Appeals Board. At that time, all issues, except jurisdiction and the Statute of Limitations were taken off calendar and the matter was submitted for decision.

On June 21, 1974, the referee issued its Findings and Order in which he concluded Petitioner's cause of action was barred by the time limitations found in Labor Code Section 5406. His Findings and Order and Opinion of Referee on Decision are attached hereto and marked Exhibit B.

Thereafter, Petitioner filed a Petition for Reconsideration with the Workmen's Compensation Appeals Board. The Appeals Board affirmed the referee's decision basing its affirmance, in part, on the Report and Recommendation of Referee on Petition for Reconsideration attached hereto and marked Exhibit C.

In response, Petitioner herein filed a Petition for Writ of Review in the Court of Appeal and a Petition for Hearing in the California Supreme Court. Both of these Petitions were denied.

Throughout her attempts to overturn the Referee's decision, Petitioner consistently claimed Labor Code Section 5406 was not applicable to the facts in her case. At no time did she claim Labor Code Section 5406 was unconstitutional until she filed her Petition for Writ of Certiorari.

ARGUMENT.

I.

Petitioner's Failure to Question the Constitutionality of Labor Code Section 5406 at Either the Trial Level or in Her Petitions for Review to the Courts of California Make Such a Claim Unavailable to Her on Petition for Certiorari.

It is well established that objections not raised or decided in the lower court will not be considered on review. *Lear Inc. v. Adkins*, 395 U.S. 653 (1968); *Wilson v. Cook*, 327 U.S. 474 (1946).

In the present case, Petitioner not only failed to raise the constitutionality of Labor Code Section 5406 at the referee level of the Workmen's Compensation Appeals Board, but she failed to raise the issue on Petition to the Workmen's Compensation Appeals Board, the Court of Appeal, and to the California Supreme Court.

The action now sought by Petitioner was available to her at the trial and appellate levels in California. She made no attempt to obtain that action. She did not attack—at any level—the constitutionality of Section 5406. As the California courts were not asked to pass on the constitutionality of Labor Code Section 5406 the claim of unconstitutionality cannot lie now.

II.

As There Is Good Reason to Limit the Time Within Which Widows of Deceased Employees May File Claims for Workmen's Compensation Death Benefits and as All Widows Filing Such Claims Are Treated Equally, Labor Code Section 5406 Is Not Unconstitutional.

It is unclear whether Petitioner feels she has been discriminated against as compared to other widows, or as a widow as compared to living injured workers. In either case, her claim cannot be substantiated.

All widows are equally subject to the limitations found in Section 5406. They must commence their action within one year of the date of death; or, conjunctively, within 240 weeks from the date of injury. *Ruiz v. Industrial Accident Commission*, 45 Cal. 2d 409 (1955). Regardless of the date of injury, Petitioner did not file her action until more than 7 years after death. Her claim was barred. The claim of any widow in a similar situation would have and will be barred.

If, on the other hand, Petitioner is claiming widows should be equated with injured workers, her claim is equally invalid. Article XX, Section 21, of the Constitution of the State of California, authorizes the Legislature to set up a complete system of workmen's compensation, ". . . and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for *injury or disability*, and their *dependents for death* incurred or sustained by said workmen in the course of their employment, irrespective of the fault of any party." Emphasis added.

The Legislature in 1917 recognized this as authority to set up two types of benefits—disability and medical benefits payable to an injured employee and death benefits payable to certain qualified dependents.

In the codification of the Workmen's Compensation Act in 1937 this distinction was carried out by the provision of disability and medical benefits to an injured party in Articles II and III, Chapter II of Part II of Division IV of the Labor Code, and the separate set of benefits providing for rights of designated dependents to accrued benefits and death benefits in Article IV, Chapter II of Part II of Division IV of the Labor Code.

The provisions and time limits for which benefits may be applied for under *Articles II and III* are entirely separate from the provisions and time limits for the filing of *benefits* under *Article IV*. The time limits for Article IV are precisely set forth in Labor Code Section 5406, the section which Petitioner alleges is unconstitutional.

The question upon which the Petition for Certiorari should be granted or denied is, therefore, whether the California Legislature acted properly in distinguishing between injured workers claiming disability and medical benefits and certain dependents (including widows) claiming death benefits.

It is well settled that Legislative classification that is not palpably arbitrary and which may reasonably be conceived to rest on some real and substantial difference or distinction bearing a just and fair relation to the legislation is not a denial of equal protection of the laws. *Frontiero v. Richardson*, 411 U.S. 677 (1973); *McGinnis v. Royster*, 410 U.S. 263 (1973); *Jefferson v. Hack-*

ney, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

If that language is thought not strong enough the Court has broadened the Legislature's discretion in statutes dealing with social or economic issues as compared to statutes involving fundamental rights. *McGinnis v. Royster; Dandridge v. Williams; United States v. Craven, C.A. Ohio* 1973, 478 F. 2d 1329, certiorari denied 414 U.S. 866, rehearing denied 414 U.S. 1086.

In the present case, two major areas of distinction commanding separate classification are present. In the case of living injured or ill workers there is comparatively little difficulty encountered in diagnosing the nature of injury or illness or in determining its relationship to the worker's occupation. The worker is available for medical examination no matter how many years have passed since the worker was last employed.

In a death claim, however, the circumstances are much different. If a significant amount of time has passed since death, proper medical evaluation may be precluded. The amount of information obtainable by autopsy decreases as time passes and eventually becomes negligible. The opinions of examining and treating physicians become more difficult to determine and are eventually lost. The employer—if not the dependent-claimant—becomes progressively disadvantaged at preparing his case for litigation.

Secondly, the two classes of claimants are reasonably distinguishable on an economic basis. A living injured or ill worker needs always expensive medical treatment. He needs disability compensation to at least partly replace his lost earnings. In many cases an injured or

ill worker will go from being the sole source of support for himself and family to a person in need of support.

In a death claim, however, the economic adversity of a dependent diminishes with the passage of time. Dependent children grow older and are better able to provide for themselves. Widows become more adapted to providing for themselves and their children. In many cases, re-marriage occurs. The affect of the expenses associated with the worker's injury or illness diminishes with the passage of time.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

WILHELMINA G. BENES,
Attorney for Hartford Accident and Indemnity Company; Employers Mutual Liability Insurance Company of Wisconsin, a Corporation, Real Parties in Interest.

SAMUELSEN, BOLSON, WHITEHEAD & BENES,
Of Counsel.

EXHIBIT A.

Applicant's Response to Petition to Dismiss and Request for Hearing and Denial of Petition.

Before the Workmen's Compensation Appeals Board of the State of California.

Alfred E. Palomares (deceased), Henrietta Palomares (widow), Applicant, vs. Consolidated Air Conditioning and Pacific Employers Insurance Co., et al., Defendants. Case No. 72 LA 376 393.

Petitioners, Consolidated Air Conditioning Company and Pacific Employers Insurance Co., have filed a request to dismiss the pleadings of applicant widow on their own behalf and on behalf of all named defendants, on the ground that the cause is barred by the statute of limitations, pursuant to Labor Code Section 5507.

FACTS

The facts pleaded by Applicant state in substance that applicant's deceased husband suffered from a latent and progressive medically unspecified disease not known to be industrially related with no intermediate disability, which culminated in his death. That it was not known nor could it have been known upon reasonable inquiry that death was industrially caused by exposure to harmful substances. That the application was filed by the surviving widow within two weeks after she knew and should have known that the cumulative disease which resulted in death was industrially caused.

The exact phraseology of the application on file identifies the disease as "Mesothelcoma", and relates as follows: "Respiratory involvement by reason of oc-

cupation starting 1946, gestation period app. 15 years, proximately caused by fibers in the air from asbestos and by-products. Cause just discovered by medical community, not known before. Cause just discovered by medical profession and applicant widow advised for first time two weeks before filing application". The application was filed June 30, 1972.

Applicant could have pleaded the facts with greater specificity, but there is no insufficiency or omission of essence to state a complete cause of action as a matter of law. If more specificity is necessary an amendment will be permitted, under the rule that the Board may order an amendment upon its own motion.

Section 10490, Rules of Practice & Procedure.
Reg. 66, No. 10-23-66

PETITIONERS HAVE NOT PLEADED A RELEVANT OR APPLICABLE CODE SECTION, NUMBER, AND SUBDIVISION AS REQUIRED BY LAW FOR DISMISSAL BY STATUTE OF LIMITATIONS

The statute of limitations in industrial cases, in the absence of specific mandate, should be exercised in harmony with C.C.P. 458, which requires that statute of limitations be pleaded by specific code section, number, and subdivision to compel the loss of a remedy. The plea is an affirmative defense which may be waived, unless the number, section and subdivision relied upon is stated.

A. Petitioner has pleaded *Labor Code Section 5406* for dismissal of the Application. Petitioner has failed and omitted to specify which of the three subdivisions of the section is relied upon to enable the Board to

apply the plea to the facts of the application on file. Each of the three subdivisions which petitioner has waived refers to a factual situation which is neither pleaded by applicant nor appears on the face of the application on file. Petitioner's plea of *Labor Code Section 5406*, is therefore non-applicable, superfluous, and without the issues of the application on file.

Said *Section 5406* is entitled, "Death Benefits". Subdivision (a) thereof presupposes that a death occurred within one year from a *specific injury*, which facts are not pleaded by Applicant. No "specific injury" is pleaded by Applicant.

Section 5406, subdivision (b) thereof, presupposes that prior benefits were furnished, which facts are not pleaded. No "prior benefits" are pleaded by Applicant.

Section 5406, subdivision (c) thereof, presupposes that compensation benefits were furnished, which facts are not pleaded. No "compensation benefits" are pleaded by Applicant.

B. Petitioners have also pleaded *Labor Code Section 5507* for dismissal of the application. Said Labor Code section is an enabling statute only, and does not specify a statutory limitation period for the facts set forth in the application.

C. Petitioners have referred to *Labor Code Section 5408* for dismissal of the application. The sham of the plea is apparent in that Petitioners have ipso facto conceded that the plea is of no consequence in the case at bar, and that the provisions of said quoted Labor Code Section 5408 are not "relevant".

D. Petitioners have pleaded *Labor Code Section 5410* for dismissal of the application. There are no

subdivisions to said Code Section. The undivided code section treats solely of one subject, which subject matter is set forth under its caption called, "New and Further Disability". No new and further disability is pleaded by applicant. Petitioner's plea of *Labor Code Section 5410,* is, therefore, redundant.

Applicant has not pleaded that either she or her deceased husband had previously commenced proceedings for normal compensation upon a prior injury under said *Section 5410.* There is nothing on the face of the application wherein any prior injury or previous proceedings whatever is mentioned or alleged.

If Petitioners, however, have cited *Section 5410* in support of Petitioners' general unsupported legal conclusion that there exists a jurisdictional limit of five years within which the Workmen's Compensation Appeals Board *may entertain an action,* the California Supreme Court has already declared contra to Petitioners.

> Subsequent Injuries Fund v. Workmen's Comp. Bd., 2 Cal (3) 56, overruling Patterson, Prazitelli, Clubb, Ferguson, Busch.

There is no jurisdictional limit of five years *excepting failure* by an applicant to proceed within a reasonable time after knowledge of the medical facts. The five year limitation period does not apply in those cases wherein an applicant does not know and could not reasonably be deemed to know, that he or she is entitled to the subsequent injuries benefits.

If there existed per se, a jurisdictional limit of five years in the Workmen's Compensation Appeals Board, why would it not apply also to Labor Code Section 5410? (Supra 2 Cal (3) 56).

Labor Code Section 5411 which establishes a statutory limit period has not been specifically pleaded by Petitioners to dismiss the application. Petitioners therefore have waived said section as applied to the facts pleaded in the application *as occupational diseases are specifically excepted* by said code section which Petitioners by omission have now conceded must be without the purview of the application, as a matter of law. The applicant in the case at bar has pleaded an occupational disease within the specific exemption.

APPLICANT HAS PLEADED AN OCCUPATIONAL DISEASE, LABOR CODE SECTION 5412.

The rule that an employee is not barred by the statute of limitations unless he knew, or in the exercise of reasonable diligence should have known, that his disability was caused by his employment, had its origin in the leading case of Marsh v. Industrial Acc. Comm. (1933) 217 Cal. 338, which was decided 14 years before the enactment of Section 5412. (See discussion in Fruehauf Corp. v. Workmen's Comp. App. Bd. (1968) 68 Cal (2) 569.

Chamber v. Workmen's Comp. App. Bd., 69 Cal (2) 558, 599

If no date of accrual is set forth in the Code, for the statute of limitations to commence to run, the date is the time that applicant knows or should know, all material elements of the cause of action.

Neel v. Magana, 6 C. (3) 176

Labor Code Section 5412 reads: "The date of injury in cases of occupational diseases is that date upon

which the employee first suffered disability therefrom AND EITHER KNEW, OR IN THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN, THAT SAID DISABILITY WAS CAUSED BY HIS PRESENT OR PRIOR EMPLOYMENT."

The code section is specific in the sense that the statute of limitations cannot begin to run, until there is an injury. Assuming that the cumulative injury resulted in the disability of death . . . the actual date of injury is spelled out as being the date of disability PLUS KNOWLEDGE OF INDUSTRIAL CONNECTION.

Chavez v. Workmen's C.A. Bd., 38 C.C.C. 174, 176 (1973)

Said *Labor Code Section 5412* as applied to an occupational disease, defines the dates of injury to a "state of knowledge", i.e. as an injury which is ascertainable by the exercise of reasonable diligence, to be industrially related.

Applicant's allegation is that disability occurred upon death and discovery of its industrial cause is a question of fact which may not be inquired into on this petition.

Chambers v. W. C. App. Bd., 69 Cal. (2) 556

Applicant's pleaded facts indicate that when the decedent at bar "died", it was not known that death was related to his prior employment. The occupational cause of injury was therefore unknown to the said decedent when he died, nor to his widow, applicant herein. Nor was the death known to be a compensable injury, to decedent's medical doctors who had been treating him.

Statutes of limitations do not ignore the right of a worker to rely upon the superior skill and knowledge of the general medical profession. It is alleged that neither the decedent, the doctors, nor the widow had knowledge that a compensable injury had occurred, nor have reason to suspect what the medical doctors who were in attendance themselves did not suspect.

WHEREFORE, Applicant prays that a date be set for hearing upon the petition for dismissal, and that the same be denied, and for such further relief as may be meet and just.

/s/ Manuel Ruiz, Jr.,
MANUEL RUIZ, JR.,
Attorney for Applicant

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C.C.P.)

State of California, County of Los Angeles—ss

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that my business address is Suite 602, 704 South Spring Street, Los Angeles, California 90014, that on November 20, 1973, I served the within APPLICANT'S RESPONSE TO PETITION TO DISMISS AND REQUEST FOR HEARING AND DENIAL OF PETITION on the interested parties in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail chute regularly maintained by the Government of the United States at 704 South Spring Street, in the City of Los Angeles, California,

addressed to the attorneys of record and interested parties, as follows:

Pacific Employers Ins. Co., 4050 Wilshire Blvd., L.A. Calif. Zonni, Ginocchio and Taylor, 3355 Glendale Blvd., L.A. Calif. Samuelsen, Bolson, Whitehead & Benes, 3130 Wilshire Blvd., L.A. Calif. Blackman Plumbing Co., Inc., P.O. Box 149, El Centro, Calif. Employers Insurance of Wausau, 3130 Wilshire Blvd., L.A. Calif. Ed. Blackman dba Ed Blackman and Son, 304 Broadway, El Centro, Calif. Hartford Accident & Indemnity Co., 3130 Wilshire Blvd., L.A. Calif.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on November 20, 1973, at Los Angeles, California.

/s/ Artemisa von Heydenreich

EXHIBIT B.

Findings and Order.

Workmen's Compensation Appeals Board, State of California.

Henrietta Palomares, (Widow), Alfred E. Palomares, (Deceased), Applicant, vs. Blackman Plumbing Company; Hartford Accident & Indemnity Co.; Consolidated Air Conditioning; Pacific Employers Mutual Liability Insurance Company of Wisconsin, Defendants. Case No. 72 LA 376-393.

Manuel Ruiz, Jr., attorney for applicant

Samuelsen, Bolson, Whitehead & Benes, by W. G. Benes, attorneys for Hartford Accident & Ind. Co.

Plourd & Blume, attorney for Blackman Plumbing Co.

Zonni, Ginocchio & Taylor, by Ralph D. Malmquist, attorney for Pacific Employers Ins. Co. and Consolidated Air Conditioning

Lawrence Dornstein, by Alex Tellou, attorneys for Employers Mutual Liab. Ins. Co. of Wisc.

Application having been filed herein; all parties having appeared, and the matter having been regularly submitted, the Honorable MARVIN M. SCHALIT, Referee finds and orders as follows:

FINDING OF FACT

1. This cause of action is barred by Labor Code Section 5406.

ORDER

IT IS ORDERED that applicant take nothing.

/s/ Marvin M. Schalit
MARVIN M. SCHALIT, Referee
Workmen's Compensation Appeals Board

Executed on June 21, 1974.

Served on said date by mail on persons shown on the official address record.

By: /s/ Leonora Cleary

MMS/lc

[Seal]

Opinion of Referee on Decision.

Henrietta Palomares, (Widow), Alfred E. Palomares, (Deceased) vs. Blackman Plumbing Company; Hartford Accident & Indemnity Co.; Consolidated Air Conditioning; Pacific Employers Mutual Liability Insurance Company of Wisconsin. Case No. 72 LA 376-393

Referee:

MARVIN M. SCHALIT

Date:

June 21, 1974

Alleged Injury:

Between October 6. 1946 and July 1964.

Manuel Ruiz, Jr., attorney for applicant

Samuelsen, Bolson, Whitehead & Benes. by W. G. Benes, attorneys for Hartford Accident & Ind. Co.

Plourd & Blume, attorney for Blackman Plumbing Co.

Zonni, Ginocchio & Taylor, by Ralph D. Malmquist, attorney for Pacific Employers Ins. Co. and Consolidated Air Conditioning

Lawrence Dornstein, by Alex Tellou, attorneys for Employers Mutual Liab. Ins. Co. of Wisc.

LIMITATION OF PROCEEDINGS: We will recite only those facts which are necessary for the decision. An Application for Death Benefits was filed with the Appeals Board on July 5, 1972, alleging death on September 5, 1964 due to an occupational disease alleged to have occurred between October 6, 1946 and July 1964 (See Minutes of Hearing, May 29, 1974). According to the Supplemental Application for Death Benefits filed with the Appeals Board there is only a surviving widow. The only question presently before the Board is whether the application filed by the widow for death benefits was timely. The time limitation in which to commence proceedings for death benefits is governed by Labor Code Section 5406 and reads:

> "The period within which may be commenced proceedings for the collection of the benefits provided by Article 4 of Chapter 2 of Part 2 of this division is one year from:
>
> (a) The date of death where death occurs within one year from date of injury; or
>
> (b) The date of last furnishing of any benefits under Chapter 2 of Part 2 of this division, where death occurs more than one year from date of injury; or.
>
> (c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

> No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury."

The controlling part of said statute for our purposes is the last paragraph. The time conditions set forth there have definitively been determined to be conjunctive in nature with the legal effect that neither may be violated (*Ruiz vs. IAC, 20 CCC 266*). Commenting on this the Court said:

> "Accordingly, the time limitation appears to be not a normal statute of limitation, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits." (*Ruiz vs. IAC, 20 CCC 267*).

Since the question presented can most easily and decisively be decided by determining if the first requirement stated in the last paragraph has been met, namely, that:

> "No such proceedings may be commenced more than one year after the date of death,"

we will apply the facts in the instant case to this requirement. The date of death was alleged and stipulated to be September 5, 1964. The application for widow death benefits was filed July 5, 1972. Hence, as the commencement of the proceeding by the filing of the application was more than one year after date of death this claim is barred.

As stated by the Supreme Court in the Ruiz case:

> "It thus appears that the Legislature in plain language has declared the governing time limitations, as it has the right to do. There is no ambiguity in the present working of the section, and it neither

requires nor admits of interpretation." (*Ruiz vs. IAC, 20 CCC 268*).

In light of the above it is not necessary for this decision to consider the argument made in the submitted Points and Authorities relative to the other requirement mentioned in the last paragraph of section 5406, namely, the requirement of commencing proceedings within 240 weeks from the "date of injury".

/s/ Marvin M. Schalit
MARVIN M. SCHALIT
Referee

MMS:lc

Minutes of Hearing (Further).

State of California, Department of Industrial Relations Division of Industrial Accidents.

Workmen's Compensation Appeals Board.

Henrietta Palomares (widow), Alfred E. Palomares (Deceased), Applicant vs. Blackman Plumbing Company, Inc.; Hartford Accident & Indemnity Co.; Consolidated Air Conditioning; Pacific Employers Insurance Company; Employers Mutual Liability Ins. Company of Wisconsin, Defendants. Case No. 72 LA 376-393.

Place and Time:

Los Angeles, May 29, 1974, at 9 a.m.

Referee:

Honorable MARVIN M. SCHALIT

Reporter:

G. C. Faurot

Appearances:

Manuel Ruiz, Jr., attorney for applicant

Samuelsen, Bolson, Whitehead & Benes, by W. G. Benes, attorneys for Hartford Accident & Indemnity Co.

Zonni, Ginocchio & Taylor, by Ralph D. Malmquist, attorneys for Pacific Employers Insurance Company and Consolidated Air Conditioning.

Lawrence Dornstein, by Alex Tellou, attorneys for Employers Mutual Liability Insurance Company of Wisconsin.

IT IS STIPULATED BY THE PARTIES that death did occur on September 5, 1964.

ISSUES:

1. Employment between October 6, 1946 and July 1964.
2. Death on September 5. 1964, proximately caused by the injury,
3. Insurance coverage.
4. Liability for self-procured medical treatment.
5. Death benefit, including burial expense.
6. Dependency.
7. Jurisdiction.
8. Statute of limitations.

All issues except jurisdiction and statute of limitations will be taken off calendar pending a decision on those issues. Defendants having no evidence to offer relative to the pending issues the.

DISPOSITION:

The matter is SUBMITTED.

EXHIBIT C.

Report and Recommendation of Referee on Petition for Reconsideration.

Henrietta Palomares, (Widow), Alfred E. Palomares, (Deceased), vs. Blackman Plumbing Company; Hartford Accident & Indemnity Co.; Consolidated Air Conditioning; Pacific Employers Mutual Liability Insurance Company of Wisconsin.

Referee:

MARVIN M. SCHALIT

Date:

July 16, 1974

Alleged Injury:

Between October 6, 1946 and July 1964

I
INTRODUCTION

Applicant petitions for reconsideration contending:

1. Labor Code Section 5406 is inapplicable to the facts.
2. The applicability of Labor Code Section 5406 is contrary to law.
3. The application of Labor Code Section 5406 is constitutionally impermissible.
4. The plea of the Statute of Limitations was waived.

II
DISCUSSION

As the Referee's Opinion on Findings and Order goes into substantial detail on the basis for his decision, it will be set out below together with minor additions and changes.

SERVED: JULY 17, 1974 BY: /s/ Leonora Cleary.

Manuel Ruiz, Jr., 704 S. Spring St., Suite 602, LA 90014; Plourd & Blume, P. O. Box 99, El Centro, California 92243; Samuelsen, Bolson, Whitehead & Benes, 3130 Wilshire Blvd., #502, LA 90005; Zonni, Ginocchio & Taylor, 3355 Glendale Blvd., LA 90039; Employers Mutual Liab. Ins. Co. of Wisc., 3130 Wilshire Blvd., LA.

LIMITATION OF PROCEEDINGS: We will recite only those facts which are necessary for the decision. An Application for Death Benefits was filed with the Appeals Board on July 5, 1972, alleging death on September 5, 1964 due to an occupational disease alleged to have occurred between October 6, 1946 and July 1964 (See Minutes of Hearing, May 29, 1974). According to the Supplemental Application for Death Benefits clarifying the original application filed there is only a surviving widow. The only question presently before the Board is whether the application by the widow for death benefits was filed timely. The time limitation in which to commence proceedings for death benefits is governed by Labor Code Section 5406 and reads:

> "The period within which may be commenced proceedings for the collection of the benefits provided by Article 4 of Chapter 2 of Part 2 of this division is one year from:
>
> (a) The date of death where death occurs within one year from date of injury : or
>
> (b) The date of last furnishing of any benefits under Chapter 2 of Part 2 of this division, where death occurs more than one year from date of injury; or,

(c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.

No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from date of injury."

The controlling part of said statute for our purposes is the last paragraph. The time conditions set forth there have been definitively interpreted to be conjunctive in nature with the legal effect that neither may be violated (*Ruiz vs. IAC, 20 CCC 266*).

Commenting on the legal effect of this the Court said:

> "Accordingly, the time limitation appears to be not a normal statute of limitation, but rather to be more in the nature of a qualifying condition in the exercise of any right to death benefits." (*Ruiz vs. IAC, 20 CCC 267.*)

Since the question presented can most easily and decisively be decided by determining if the first requirement stated in the last paragraph has been met, namely, that:

> "No such proceedings may be commenced more than one year after the date of death,"

we will apply the facts in the instant case to this requirement. The date of death was alleged and stipulated to be September 5, 1964. The application for widow death benefits was filed July 5, 1972. Hence, as the commencement of the proceeding by the filing of the application was more than one year after date of death this claim is barred. As stated by the Supreme Court in the Ruiz case:

> "It thus appears that the Legislature in plain language has declared the governing time limitations, as it has the right to do. There is no ambiguity in the present wording of the section, and it neither requires nor admits of interpretation." (*Ruiz vs. IAC, 20 CCC 268*).

In light of the above it is not necessary for this decision to consider the argument made in the submitted Points and Authorities relative to the other requirement mentioned in the last paragraph of Section 5406, namely, the requirement of commencing proceedings within 240 weeks from the "date of injury".

At the May 29, 1974 hearing, the defendants offered no evidence relative to the issue of Statute of Limitations, hence, the allegation in that respect can be regarded as established. Conceding that Labor Code Section 5412 would be controlling as the "date of injury" under Labor Code Section 5406 and that the defendants failed to sustain their affirmative burden, the applicant still has not satisfied the other requirement of the last paragraph of Labor Code Section 5406 discussed above, namely that proceedings may not be commenced for the collection of death benefits more than one year from date of death. As this "qualifying condition" has not been met, regardless of the reason, this cause of action is barred. There was no waiver of the defense of the Statute of Limitations by the defendants as this has been continuously contended by them from the outset of this case.

III
RECOMMENDATION

That the petition be denied.

/s/ Marvin M. Schalit
MARVIN M. SCHALIT
Referee

MMS:lc

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-880

HENRIETTA PALOMARES,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondent,

BLACKMAN PLUMBING COMPANY, ED BLACKMAN, LESTER BLACKMAN, CONSOLIDATED AIR CONDITIONING COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Real Parties in Interest.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District.

Petitioner Henrietta Palomares seeks a review of the decision of the Workmen's Compensation Appeals Board of the State of California after a denial of Petition for Writ of Review by the Court of Appeal of the State of California, Second Appellate District and after denial of a Petition for Hearing by the Supreme Court of the State of California by way of a Petition for Writ of Certiorari to said Court of Appeal. Respondent Pacific Employers Insurance Company (a real party in interest but not listed in the caption), opposes said Petition for the following reasons:

Petitioner has raised a controversy involving the constitutionality of California Labor Code Section 5406 which prescribes the time in which a dependent of a

deceased worker may bring an action before the California Workmen's Compensation Appeals Board for death benefits provided elsewhere in the California Labor Code.

The controversy relates specifically to a situation wherein, allegedly, the worker died as the result of an occupational disease. The California Labor Code provides that a living worker who sustains an injury as a result of an occupational disease must bring his action for workmen's compensation benefits (disability indemnity and/or medical treatment) within a year of the date upon which he first suffered disability from the disease and either knew or in the exercise of reasonable diligence should have known that such disability was caused by his present or prior employment. On the other hand the California Labor Code provides that an adult competent dependent of such a deceased worker must bring an action for death benefits within one year of the date of death (or within 240 weeks of the date of injury where there is an injury during the worker's lifetime and such injury results in death).

In the instant case apparently the death occurred without known injury prior to death. Petitioner instituted her action for death benefits several years after the date of death. In effect the petitioner urges that the limitation period for her cause of action should be one year from the date of death or one year from the date she either knew or in the exercise of reasonable diligence should have known that such death was caused by the decedent's employment, whichever is later.

As the law does not so provide, petitioner urges that: 1. There is an unconstitutional classification so that she has been denied equal protection of law and,

2. As her cause of action was cut off before her right to death benefits accrued she has been unconstitutionally deprived of property without due process of law.

Neither of these constitutional issues were raised before the courts below or before the California Workmen's Compensation Appeals Board.

Respondent herein objects to the record designated by petitioner. It is not the entire record.

Petitioner Did Not Raise a Federal Question Before the California Courts.

In *Levy v. San Francisco Superior Court,* (1897) 167 U.S. 175, 17 S.Ct. 769, 42 L.Ed. 126 at page 177, the petitioner therein argued that the enforcement of Sections 1458 to 1461 of the California Code of Civil Procedure was a denial of the equal protection of the law. The Supreme Court noted that the record does not show that the petitioner made any such claim in the state court. At pages 177 to 178 the Supreme Court, quoting *Oxley Stave Co. v. Butler County,* 166 U.S. 648 stated:

> "The jurisdiction of this court to reexamine the final judgment of a state court cannot arise by inference, but only from the averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

At page 5 petitioner states that she:

> "Raised substantial questions of federal violation by alleging that Labor Code Section 5406, as applied in the case at bar, was 'constitutionally impermissible,' 'contrary to law', 'substantively and procedurally unconstitutional', and that a

> lack of finding that there was no knowledge of industrial causation available to appellant (sic) or to the medical profession invalidated the judgment."

It is patent that these statements are not distinct and positive averments of a Federal question. However, when these statements are considered in their context it even becomes more clear that no Federal question was raised in the courts below.

Petitioner's brief before the California Supreme Court and the Court of Appeal contains the following headnote:

> *"APPLICATION OF LABOR CODE SECTION 5406 IS CONSTITUTIONALY* (sic) *IMPERMISSIBLE."*

In the body of the discussion under this point appears the following:

> "The lack of findings relative to the nature of employment injury and knowledge of occupational disease constitutionally invalidated the judgment for want of due process."

Nothing else in the argument bears on any constitutional issue. This statement is a far cry from a contention that Labor Code Section 5406 in its application to her case serves to deprive her of property without due process of law.

Petitioners's brief below contains the following headnote:

> *"RATIONALE LABOR CODE SECTION 5406 IS CONTRARY TO LAW WHEN APPLIED TO THE CASE AT BAR."*

There is nothing at all in the discussion that follows this headnote that bears upon any Federal question.

Respondent is unable to find the phrase "substantively and procedurally unconstitutional" in petitioner's brief below. It is difficult for respondent to perceive what the statement: "that a lack of finding that there was no knowledge of industrial causation available to appellant (*sic*) or to the medical profession invalidated the judgment." has to do with due process and equal protection of the law.

Respondent will concede that the following statement appears in the discussion under the headnote:

> *"THE LEGISLATIVE CONSTITUTIONAL CLASSIFICATION IN THE RUIZ CASE IS DISTINCT."*
>
> "Prior to a decade ago, the art in medical and other inexact sciences was such that tools to enable disclosure or causation of many occupational illnesses were unknown. There was no reasonable hypothesis upon which to base a constitutional demand for 'equal protection of the law' of a disease not known to be industrially caused, as compared with those illnesses which were of definite diagnosis as being industrially related, for which disability payments had been or could be made because of definiteness."

The foregoing is certainly not a contention that California Labor Code Section 5406 as applied to petitioner's case has deprived her of equal protection of law.

In view of these vague references in petitioner's brief before the courts below, how can it be said that the California Supreme Court or the California Court of Appeal actually decided a Federal question?

California Labor Code Section 5406 Does Not Create an Unconstitutional Classification of Persons and Thus Operates to Deny Petitioner or Persons Similarly Situated Equal Protection of the Law.

California Labor Code Section 5406 reads as follows:

> "The period within which may be commenced proceedings for the collection of the benefits provided by Articles 2 or 3, or both, of Chapter 2 of Part 2 of this division is one year from:
>
> (a) The date of death where death occurs within one year from date of injury; or
>
> (b) The date of last furnishing of any benefits under Chapter 2 of Part 2 of this division, where death occurs more than one year from the date of injury; or
>
> (c) The date of death, where death occurs more than one year after the date of injury and compensation benefits have been furnished.
>
> No such proceedings may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury."

California Labor Code Section 5412 reads (prior to 1973 amendment) as follows:

> "The date of injury in cases of occupational diseases is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment."

Petitioner herein seems to be arguing that because, pursuant to California Labor Code Section 5406 she

has only one year to perfect her claim, whereas a living worker pursuant to California Labor Code Section 5412 has until a year after he discovers that his disability was due to his employment, there is an unconstitutional discrimination between persons of the same class, that is, between a living worker and an adult competent dependent of a deceased worker.

California Labor Code Section 5412 is an outgrowth of a California Supreme Court decision in *Marsh v. Ind. Acc. Com.*, 217 Cal. 338, 19 P.2d 933, 86 A.L.R. 583.

After a lengthy analysis at page 351 of the official report the court states:

> " 'From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as pneumoconiosis, it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment. . . . In order to justify an award for disability or death due to an occupational disease, there must always be established an unbroken causal connection between the injury and the employment or the condition under which the employee is required to carry on his work. The connection must be such as to show that the disease or injury was proximately

> caused by the employment or the conditions of work; and when such unbroken chain of causation is found to exist, then all physical consequences flowing from the disease or injury are proper elements for consideration in determining the merits of a claim for compensation or death benefits.' "

In the foregoing it can be seen that the court was concerned with the problem that where an occupational disease is incipient during the course of exposure it may not become full bloom until years later and even then may take some time before the relationship of the disability to some employment is established. However, after disability occurs then due diligence must be exercised by the worker to discover any relationship to his employment. When the relationship is established the worker then has one year to perfect his claim. When death ensues before discovery of any employment relationship then the dependent competent adult has one year to file a claim.

Whether Labor Code Section 5406 is a statute of limitations is open to question. In *Ruiz v. Ind. Acc. Com.*, 45 Cal.2d 409, 289 P.2d 239 at page 414 the California Supreme Court, with reference to this section, stated:

> "Accordingly the time limitation appears to be not a normal statute of limitations, but rather to be in the nature of a qualifying condition in the exercise of any right to any death benefits. Diligence in the presentation of the claim, so as not to be guilty of sleeping on one's rights, apparently has no bearing if the specified time provisos are not satisfied."

If it is a true statute of limitations then as to all persons in petitioner's position, all that is required is that the period be reasonable. In *Chase Securities Co. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628, re hearing denied, 325 U.S. 896, 65 S.Ct. 1569, ... L.Ed. 2006, at pages 313 to 315 the Supreme Court stated:

> "Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments. Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the costs from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through

the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. The contrast between the acceptable result of reasoning of *Campbell v. Holt* and its rather unsatisfactory rationalization was well pointed out by Mr. Justice Holmes when as Chief Justice of Massachusetts he wrote: 'Nevertheless in this case, as in others, the prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make

> out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power. *Camfield v. United States*, 167 U.S. 518, 523, 524. But however that may be, multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small.' *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 59 N.E. 1033. This statement was approved and followed by the New York Court of Appeals in *Robinson v. Robins Dry Dock Co.*, 238 N.Y. 271, 144 N.E. 579."

While there seems to be a clear distinction between a class composed of a living worker and a class composed of dependents of a diseased worker it would also seem that death opposed to disability is a significant distinction. Furthermore, during the lifetime there is not the problem of the staleness of the claim whereas after death there is.

It is apparent from a review of *Ruiz v. Ind. Acc. Com., supra*, that the California Legislature must have been considering stale claims when Labor Code Section 5406 was amended to read in its present form in 1947.

This different legislative classification must be palpably unreasonable before such classification would be overturned (*Los Angeles v. So. Cal. Telephone Co.*, (1948) 32 Cal.2d 378, 392. 196 P.2d 773. Also see *Asbury Hospital v. Cass County*, (1945), 326 U.S. ...., 66 S.Ct. 61, 65, 90 L.Ed. 6, 13; *McGowan v. Maryland*, (1961) 366 U.S. 420, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399).

Petitioner Has Not Been Deprived of Property Without Due Process of Law.

Petitioner appears to be arguing that since Labor Code Section 5406 in allowing only one year for the filing of claim for death benefits, she is prevented from later discovering the cause of death and hence has lost her cause of action before it accrued.

In *Ruiz v. Ind. Acc. Com., supra*, 45 Cal.2d 409, 289 P.2d 229, *supra*, at page 414, the California Supreme Court considered a somewhat similar argument and stated: "Petitioner claims that the application of the statute so as to cut off any right to death benefits before it accrues would be unconstitutional as a deprivation of property without due process of law." (U.S. Const., Fourteenth Amend.; Cal. Const., Art. I, Section 13.) "However her right to recover death benefits is wholly statutory, and her constitutional objection has no bearing on issue."

The California Supreme Court may have been referring to the fact the cause of action for wrongful death was unknown at common law and therefore any statutory provisions for such action must be strictly adhered to. The same rationale applies to provisions for death benefits for the dependents of the deceased workers.

The argument that the petitioner's cause of action is lost before it arises is not really relevant. It is the deceased's cause of action which never arises. Petitioner's cause of action, if any, arises at the date of death.

Conclusion.

There is a rational distinction between the events prescribed for the beginning of the running of the statute of limitations in occupational diseases as between a living worker and a surviving dependent. There is good reason for the concept of the due diligence in the one instance and of no diligence in the other instance. Moreover, a legislative classification should not be easily overturned.

In any event, as petitioner has not properly preserved her constitutional questions in the lower courts, she has no standing in this court.

For all the foregoing reasons it is submitted that the Petition for Writ of Certiorari should be denied.

Dated: February 14, 1975.

ZONNI, GINOCCHIO & TAYLOR,
By MARCO J. ZONNI,
Attorneys for Respondent.

SUPREME COURT, U. S.
FEB 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-880

HENRIETTA PALOMARES,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondent,

BLACKMAN PLUMBING COMPANY, ED BLACKMAN, LESTER BLACKMAN, CONSOLIDATED AIR CONDITIONING COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN,

Real Parties in Interest.

RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

Briefs in opposition to Petition for Writ of Certiorari have been filed which

contain the assertion that Petitioner did not raise a federal question before the California Courts.

Under the caption, "APPLICATION OF LABOR CODE SECTION 5406 IS CONSTITUTIONALLY IMPERMISSIBLE",

At the initial phase of the case before the Hon. Marvin M. Schalit, Referee, and more specifically in opposition to his findings and order dated June 21, 1974, attention was specifically called in the record which was later reviewed by the Court of Appeal of California, Second Appellate District, and the Supreme Court of the State of California, to the Constitution, and the Constitutional Point was raised in the following language, at page 4 of the Petition for reconsideration at the level of first instance;

"UNDER THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION, BOTH STATE AND FEDERAL, TO CLASSIFY THE SURVIVING WIFE WHO SUBMITS A CLAIM FOR DEATH BENEFITS AS AN OUTLAW BY SUBMITTING A SO CALLED OUTLAWED CLAIM, IS IMPERMISSIBLE. THIS IS PARTICULARLY SO IF TO DO SO SHE IS IMPUTED TO

HAVE KNOWLEDGE OF THE EXISTENCE OF AN INDUSTRIALLY CAUSED CONDITION, FOR A PERIOD OF ONE YEAR AFTER THE DEMISE OF HER HUSBAND, WHO KNEW NOTHING, COMPOUNDED BY THE FACT THAT THE MEDICAL PROFESSION ALSO WAS WITHOUT KNOWLEDGE."

The Referee's report, in spite of the above language, omitted and failed, to consider or make a finding thereon.

In support of the above, reference is made to Exhibit "B", at page 9 et seq., of the answer to Petition for Writ of Certiorari, filed by Real Parties in Interest, by Counsel Messrs. Samuelsen, Bolson, Whitehead & Benes, incorporated herein by reference. Said report and recommendation of Referee on Petition for Reconsideration, in face of the constitutional point raised, was adopted in toto by the Workmen's Compensation Appeals Board of the State of California, (See Appendix B - Order Denying Reconsideration), which was reviewed by the California Courts.

It is clear that the sole issue claimed by the Board and California Courts as necessary to their decisions,

was the State law violation of the Equal Protection clauses of the State and Federal Constitutions, as raised in the first instance.

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Attorney for Petitioner
for Writ of Certiorari,
Henrietta Palomares.